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Supreme Court of

OCTOBER T

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THE PEOPLE OF THE STATE

BERL B. ZOOK and WILMER

Petition for Writ of Certi
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TERM, 1948.

OF CALIFORNIA,

Petitioner,

vs.

R K. CRAIG.

tiorari to the Appellate De-
erior Court of the State of
the County of Los Angeles.
Thereof.

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STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the People of the State of California for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The case presents the question of the validity of a statute of the State of California (California Penal Code, Sec. 654.1) which makes it unlawful to sell in the State of California transportation of passengers by carriers who do not have permits so to act from the Interstate Commerce Commission or from the Public Utilities Commission of the State of California.

In the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California (hereinafter referred to as the Municipal Court), Bert B. Zook and Wilmer K. Craig were charged with the commission of a misdemeanor, to wit, the violation of Section 654.1 of the California Penal Code [R. 2].

Pertinent sections of the Penal Code are printed in an Appendix hereto, at page 23 hereof.

The defendants filed a demurrer to the complaint [R. 3], which came on for hearing before Judge Kaufman of the Municipal Court. The certificate of Judge Kaufman concerning the questions considered on demurrer appears in the record [R. 30]. The demurrer was overruled [R. 11], and the case came on for trial after entry of plea of not guilty by each defendant. The evidence consisted of a written stipulation of facts [R. 15]. The trial court found the defendants guilty [R. 12], after which the defendants made a motion in arrest of judgment [R. 12]. The certificate of the trial judge concerning questions of law considered upon such motion appears in the record [R. 31].

The defendants insisted at all times that the state statute was invalid as constituting a regulation of a phase of interstate commerce which is already covered by federal statute, and the petitioner herein at all times sustained the validity of the statute against such attack and relied upon the federal Constitution and decisions of this court as authority for the statute. Defendants' motion in arrest of judgment was denied [R. 13] and judgment was pronounced against each of the defendants [R. 13]. The defendants filed notice of appeal [R. 1] and a proper statement on appeal [R. 14].

The case was thereafter argued by counsel for the defendants-appellants and for the People, and submitted in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. On July 21, 1948, the Appellate Department reversed the judgment of the Municipal Court, [R. 24] in a decision holding that the statute was invalid because it affected a subject which was regulated by federal law. The opinion of such court appears in the record, commencing at page 19. On July 27, 1948, your petitioner filed its petition for rehearing in the Appellate Department of the Superior Court [R. 25], which petition was denied on August 3, 1948 [R. 29].

Thereafter your petitioner filed notice of its intention to ask certiorari from the United States Supreme Court, and secured a stay of remittitur and execution [R. 33].

Contentions of the Parties.

The defendants, in support of the federal question raised by them, urged that because the Federal Motor Carrier Act provides that any person not a broker licensed by the Interstate Commerce Commission, who sells transportation subject to the provisions of the Interstate Commerce Act (Part II, 49 U. S. C. A., Chapter 8), sometimes hereinafter called the Federal Motor Carrier Act, is subject to punishment for such action, the state cannot also punish him for the commission of such act, even though the state statute does not in any manner conflict with the federal law or interfere with the fulfillment of the policy of Congress.

The basis for the contention of the parties may be best understood by having in mind that the defendants were conducting what is commonly known as a "travel bureau," unlicensed by either federal or state authority, by selling transportation of persons for carriage by unlicensed casual, occasional or reciprocal operators of motor vehicles.

As will be more fully developed hereafter, the carriers who transported persons to whom such transportation was sold were operating in violation of the Federal Motor Carrier Act.

In answer to the contentions of the defendants, your petitioner urged:

(1) That the statute applies to a matter of local concern; that the transactions with which the defendants were charged were fully completed within the State of California, and that the statute affects interstate commerce only indirectly and incidentally.

(2) That the statute does not interfere with interstate commerce inasmuch as, though the carrier was operating in defiance of federal authority, the state made no attempt to prevent or interfere with the transportation of persons to whom tickets were sold, or with the casual, occasional or reciprocal carriers, and that such effect as the law might have upon interstate commerce is purely incidental to the effectuation of a state policy which coincides with the federal policy.

(3) That the statute does not conflict with any federal regulation of carriers and does not prevent or hinder the carrying out of the policy of Congress; on the other hand, it is designed to and does tend to carry out the policy of Congress with respect to the regulation of motor carriers and assist in suppressing activities which constitute violations of federal statutes.

(4) That while the same act may constitute a violation of both state and federal law punishable by each of such jurisdictions, if the act proscribed by the state is essentially local in character, its effect upon interstate commerce will be slight and incidental only. This is particularly true in a case where, as in the case at bar, the act prohibited by state law does not affect in any manner whatsoever interstate commerce or compliance with the federal statute.

In its decision the Appellate Court held that, when Congress has taken the subject matter of legislation in hand, coincidental regulation by the state is as ineffectual as opposition. However, the court failed to give any consideration to the fact that language to that effect appears only in cases in which the coincidence related to the regulation of commerce lawfully conducted under the provisions of federal laws and in which there was either actual or potential conflict in the attempted regulation of commerce lawful in its inception and conduct under federal law. In the instant case the coincidence touches only interstate movements which are unlawful in their inception and prohibited under federal statute.

B.

Basis of Jurisdiction of the United States Supreme Court to Review the Judgment.

1. Statutory Provisions.

The statutory authority believed to sustain the jurisdiction of the Supreme Court of the United States to issue a writ of certiorari in this cause is Judicial Code, Section 237(b), as amended February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937; January 31, 1928, Chap. 14, Sec. 1, 45 Stat. 54, and April 26, 1938, Chap. 440, 45 Stat. 466 (U. S. C. A., Title 28, Sec. 344).

2. The Statute of the State, the Validity of Which Is Involved.

The California statutes, the validity of which was denied by the Appellate Department of the Superior Court, the highest court of such state having jurisdiction of an appeal from the judgment of a municipal court in a misdemeanor action, is Section 654.1 of the California Penal Code, which section was added to the Code by Statutes of 1947 of the State of California, Chapter 1215, page 2723. By the same Act of 1947, two additional sections 654.2 and 654.3, were added to the Code, but their provisions do not affect the validity of Section 654.1 and are not involved in the instant case. However, the entire statute is printed in an Appendix hereto (p. 27).

We summarize the provisions of Section 654.1 of the Penal Code, as follows:

(1) It is declared to be unlawful for any person, corporation, partnership, etc.,

(a) to sell, offer for sale, provide or arrange for, or

(b) to advertise, or hold himself out as one who sells or offers to sell or negotiates, provides or arranges for

(c) transportation of persons on an individual fare basis over the highways of the State of California

(2) unless the transportation sold or offered for sale is to be furnished or provided solely, and such sale is authorized by

(a) a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit from

(b) the Public Utilities Commission of the State of California, or

(c) the Interstate Commerce Commission of the United States

(d) authorizing such carrier to engage in the business of carrying passengers.

The effect of the state statute is that, when and if a carrier, be he a casual, occasional or reciprocal carrier or other carrier, secures any kind of valid permit to engage in interstate transportation of persons, the state statute in question ceases to apply to persons who sell transportation by such carrier pursuant to the carrier's authorization, irrespective of whether such seller is licensed as a broker under the federal law.

Although the statute is so broad as to reach individuals who sell only one ticket for transportation by an unauthorized carrier, the validity of the statute, by reason of the facts in evidence by stipulation, is questioned in this case only in so far as the statute applies to persons engaged in the business of selling transportation by unlicensed casual, occasional or reciprocal carriers.

Section 654.2 of the Penal Code sets out certain exceptions to the provisions of Section 654.1 which are not material to the case at bar, and Section 654.3 provides penalties for violation of Section 654.1.

3. Date of Judgment.

The final judgment of the Appellate Department, sought to be reviewed, was rendered on July 21, 1948 [R. 24]. Petition for rehearing was filed on July 27, 1948 [R. 25] and such petition was denied on August 3, 1948 [R. 29]. The decision of the Appellate Department of the Superior Court is a formal opinion which will be published in Advance California Appellate Reports (cited A. C. A.), and in the bound volume of California Appellate Reports which will be cited as ..... Cal. App. 2d (Supp.) ..... It will also be printed in Pacific Reporter, 2d Series. By reason of the fact that at the time this petition is written such opinion had not been printed, we are unable to furnish volume and page where it will be printed, but as such information becomes available it will be supplied to the court. Such opinion is printed in full in the record filed in this court [R. 19].

4. Nature of the Case and Rulings of the Appellate Department of the Superior Court.

I.

Nature of the Case.

This is a criminal prosecution for the commission of a misdemeanor arising out of a violation of a state statute. The action was commenced by the filing of a verified complaint in the Municipal Court of the City of Los Angeles [R. 2], charging the defendants with having sold, offered to sell, negotiated, provided and arranged for the transportation of persons on an individual fare basis over the public highways of the State of California by a carrier other than a carrier having a valid and existing certificate of convenience and necessity, or other permit to provide such transportation, issued by either the Interstate Commerce Commission of the United States or the Public Utilities Commission of the State of California, in that defendants held themselves out as being willing to sell and negotiate for the sale of such transportation to persons named in the complaint for transportation from Los Angeles, California, to Fort Worth, Texas, over a carrier not licensed by either of the above named Commissions to engage in such transportation [R. 2].

In accordance with the provisions of the Penal Code (Secs. 1428.1, 1428.2 and 1428.3) of the State of California, the defendants filed a demurrer to the complaint [R. 3 and 11] which was overruled [R. 11], after which they entered a plea of not guilty [R. 11]. No written

plea was entered for the reason that under the laws of California, pleas in criminal cases are oral (California Penal Code, Sec. 1017).

The cause came on for trial [R. 12] and evidence in the form of a written stipulation of facts was introduced as the only evidence in the case [R. 12 and 15]. Thereafter the defendants were found guilty [R. 12] and, pursuant to the provisions of the California Penal Code, they made a motion in arrest of judgment [R. 12] (Penal Code, Secs. 1428.1 and 1452), which motion was denied [R. 13], after which judgment was pronounced against each of the defendants [R. 13]. The defendants appealed from the judgment by filing a written notice of appeal [R. 1]. The grounds of appeal appear in full in the record [R. 35]. Briefly stated, such grounds were:

That the trial court erred in holding that the act of the defendants in selling transportation by an unlicensed carrier from Los Angeles to Fort Worth was punishable under the state law because such transportation was a transaction in interstate commerce which was within the exclusive jurisdiction of the federal courts, and that Section 654.1 of the California Penal Code attempts to punish an act which is within the exclusive jurisdiction of the federal courts by reason of the fact that Congress had fully occupied the field of possible legislation.

Consequently, the appeal was submitted to the Appellate Department of the Superior Court solely upon a federal question.

II.

Rulings of the Appellate Department of the Superior Court.

In its opinion reversing the order and judgment of the Municipal Court, the Appellate Department of the Superior Court stated that:

(1) Section 654.1 of the California Penal Code forbids the doing of acts the performance of which is forbidden by and punishable under the federal law [R. 21].

(2) When Congress has taken the particular subject matter of legislation in hand, coincidental legislation is as ineffective as conflicting legislation [R. 21].

(3) When Congress has legislated upon a matter of interstate commerce, thereby taking possession of the field, a state may no more supplement such federal legislation than it can annul it [R. 22].

(4) The power of Congress to regulate interstate commerce being supreme, when Congress has exerted its powers of legislation state laws cannot be applied to the subject matter coincidentally with or as complementary to federal enactments *which disclose the intention to enter* a field of legislation within its jurisdiction [R. 22].

It appears plain from the entire decision of the Appellate Department that its decision is based upon the concept that, when and if the federal government *enters* the field of regulation of any phase of interstate commerce, the states may not enact legislation within such field even though such legislation not only does not conflict with the federal law but tends to, and in its operation in fact does, aid in carrying out the policy of Congress.

Your petitioner does not contend that a state law which undertakes to *regulate* the manner of interstate transportation, or any state law which presents either an actual or a potential conflict with or hindrance to the effectuation of congressional policy, would be valid. The sole contention of your petitioner is that a statute of the state which complements the federal law by prohibiting an act local in character, which act is also prohibited by federal law, is not invalid merely by reason of the fact that coincidentally both laws punish the same act. Especially is this true where, as here, the state law is so carefully drawn that it cannot interfere with or otherwise affect the interstate transportation of persons by any carrier authorized by federal law to engage in such occupation.

5. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

I.

The Judgment of the Appellate Department of the Superior Court Is a Final Judgment.

1. The existence of jurisdiction is to be tested by the substantial operation of the judgment.

U. S. v. Thompson, 251 U. S. 407, 412.

2. The judgment finally determines that the defendant is not required to comply with the statute of the state in selling transportation from California to points outside the state.

U. S. v. Oppenheimer, 242 U. S. 85, 88.

3. Upon denying a petition for rehearing the judgment of the Appellate Department becomes final.

California Judicial Council Rules, Appellate Dept. Superior Court, Rule 7 [Appendix, p. 32].

II.

THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IS ONE OF LAST RESORT.

Kim Working v. California (Schneider v. State, Town of Irvington), 308 U. S. 147, 154;
California v. Thompson, 313 U. S. 109;
Unemployment etc. Com. v. St. Francis etc. Ass'n., 58 Cal. App. 2d 271, 277;
Berg v. Traeger, 210 Cal. 323, 325;
People v. Reed, 13 Cal. App. 2d 39, 40.

III.

THE WRIT OF CERTIORARI WILL ISSUE UPON THE PETITION OF A STATE OR ITS AGENCIES WHERE THE CLAIM OF INVALIDITY OF THE STATE STATUTE IS BASED UPON CONFLICT WITH AUTHORITY VESTED IN THE FEDERAL GOVERNMENT AND SUCH CLAIM IS SUSTAINED BY THE STATE COURT.

California v. Thompson, 313 U. S. 109;
State Tax Com. v. Van Cott, 306 U. S. 511, 513;
Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 16, 17;
Minnesota v. Blasius, 290 U. S. 1, 5;
McGoldrick v. Berwind-White etc. Co., 309 U. S. 33;
Coleman v. Miller, 307 U. S. 433;
Ireland v. Woods, 246 U. S. 323, 327, 328.

IV.

THE JUDGMENT OF THE COURT WAS BASED UPON AN ASSERTED CONFLICT OF THE STATE STATUTE WITH A POWER VESTED IN THE FEDERAL GOVERNMENT.

State Tax Com. v. Van Cott, supra, 306 U. S. 511, 514.

V.

SECTION 237 OF THE JUDICIAL CODE MAKES NO DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES IN RESPECT TO THE REVIEW OF THE JUDGMENTS OF STATE COURTS BY THE SUPREME COURT OF THE UNITED STATES.

Twitchell v. Commonwealth of Pennsylvania, 74 U. S. 321, 324.

6. Grounds Upon Which It is Contended the Questions Involved Are Substantial.

I.

If this Honorable Court is unable to say that every question is foreclosed by prior decisions and clearly not debatable, it cannot be said that no question of substance is presented.

Chesebro v. Los Angeles County Flood Control District, 306 U. S. 459, 463;

Hamilton v. University of California, 293 U. S. 245, 258.

II.

Until Congress, under the commerce power, adopts legislation which is inconsistent with the exercise of the police power of the state, a state statute enacted by a state under the reserved police power, which statute appertains primarily to matters of local concern and only indirectly and incidentally affects interstate commerce, will not be held to be invalid.

California v. Thompson, 313 U. S. 109, 115;

Hartford Accident and Indemnity Co. v. Illinois, 298 U. S. 155, 158;

Armour & Co. v. North Dakota, 240 U. S. 510, 517.

III.

Fraudulent or unconscionable conduct of those engaged in selling transportation of persons by casual carriers is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of congressional action.

California v. Thompson, 313 U. S. 109, 115.

IV.

A state regulatory statute is not void as imposing a burden upon interstate commerce where the burden imposed is an inseparable incident of the exercise of legislative authority which, under the federal Constitution, has been left to the states.

Zifrin v. Reeves, 308 U. S. 132, 141;
California v. Thompson, 313 U. S. 109.

V.

In the absence of the exercise of federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interests, even though interstate commerce is directly affected.

Bichholz v. Public Service Commission, 309 U. S. 268, 274;
Kelly v. Washington, 302 U. S. 1, 10.

VI.

In enacting the Federal Motor Carrier Act of 1935 Congress did not intend to supersede state police regulations established for the protection of the public.

H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 85;
Mayer v. Hamilton, 309 U. S. 598, 614.

See also:

South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 189.

VII.

The transportation sold by persons coming within the prohibitions of Section 654.1 of the California Penal Code is for carriage by persons operating as casual, occasional or reciprocal carriers who often have no financial responsibility and are not licensed by any authority to engage in such operations. Prosecution of the carriers will afford no protection to persons who have purchased such transportation and are either "dumped" en route by the carrier or suffer injury or loss by reason of the conduct of the carrier. So far as we can ascertain, with the exception of an abortive effort in Los Angeles to suppress their practices by criminal prosecution in the United States District Court some years ago, no effort to stop their activities has been made by federal officers other than by letter informing such dealers that they might be subjected to prosecution. We can readily see practical reasons why adequate suppression of such dealers cannot be effected under the existing federal law.

The foregoing statement is not to be construed either as a criticism or reflection upon federal authorities charged with the duty of administering the federal statute.

As a practical proposition, in the absence of means whereby local officers operating under state statutes may bring such dealers before the local courts, we can have no protection to the public with respect to the operation of so-called casual carriers. Many of such carriers were found by the Interstate Commerce Commission to be regularly engaged in the business of transporting passengers. (*Ex Parte No. MC 35*, 33 M. C. C. 69).

7. Stage in Proceedings and Method of Raising Federal Questions.

When the defendants were arraigned in the Municipal Court they asked permission to file a demurrer to the complaint. Thereafter, as provided by Sections 1428.1 and 1428.2 of the California Penal Code, they filed a written demurrer [R. 11], which demurrer appears in the record at page 3. In the demurrer the federal question was raised in the following language:

> "That it appears upon the face of the complaint that the facts stated do not constitute a public offense against the laws of the State of California in that it is alleged in substance that the transportation offered to be sold and sold by the defendants was interstate commerce, and hence Section 654.1, California Penal Code, had, and now has, no application."

Such demurrer being overruled after argument by counsel for defendants and counsel for the People, the defendants entered a plea of not guilty and the case came on for trial. After conviction the defendants entered a motion in arrest of judgment [R. 12], as provided by Sections 1428.1 and 1452 of the California Penal Code. Such motion was oral, as permitted under the practice in this state. The federal question was thus again raised in substantially the same form as in the demurrer, as shown by the certificate of the trial judge [R. 31]. After argument by counsel for the defendants and for the People, the position of the prosecution was upheld and the motion was denied [R. 13]. Judgment and sentence was thereafter imposed [R. 13] and defendants appealed to the

Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles [R. 4], and in such court again raised the same federal question in somewhat more detailed form. For the exact language by which the federal question was raised in the Appellate Court, see the record at page 18.

C.

The Questions Presented.

I.

Does the fact that Congress has entered the field of regulation of casual, occasional or reciprocal carriers by motor vehicle prevent the state from enacting a statute which does not undertake to regulate such carriers nor otherwise affect interstate commerce other than as an incident arising out of prohibition of the activities of selling transportation for carriage by carriers other than those having valid permits from constituted authority to engage in such transportation? The effect of the state statute is to prohibit the sale of all transportation over California highways by means of carriers whose operations constitute violations of the Federal Motor Carrier Act. The statute affects intrastate transportation in the same manner and to the same degree, hence no question of discrimination arises.

II.

Is a state statute, regulatory of a local situation only, which does not conflict with or impede the effectuation of the policy of Congress but, on the other hand, aids in such effectuation, void because of the fact that incidentally the state thereby enters a field of legislation previously entered by the federal government?

III.

Did the Appellate Court, in deciding a federal question of consequence, improperly apply various decisions of this court based upon certain factual situations to a question of law in the case at bar arising out of an entirely different situation, thereby deciding a federal question of substance in a manner probably contrary to the applicable decisions of this court?

IV.

Is the transportation of persons by casual, occasional or reciprocal operators of motor vehicles in violation of positive penal laws of the United States, interstate commerce within the intent and meaning of the federal Constitution and federal statutes so as to render the states incompetent to prohibit the sale of transportation to be carried by such unlawfully operating carriers?

D.

The Reasons Relied on for the Allowance of the Writ.

I.

The Appellate Department of the Superior Court has decided a federal question of substance not heretofore decided by this court, and has decided such question in a way which is probably not in accord with the applicable decisions of this court.

II.

The Appellate Department of the Superior Court, in deciding a federal question of substance, erroneously applied language of this court in commerce cases involving the validity of state laws which created an actual or potential conflict with federal authority, to a statute so care-

fully drawn as to preclude the possibility of conflict with federal regulation, which state statute was designed to meet a local condition and to carry out the policy of Congress in a field of regulation in which federal enforcement was proven ineffective.

III.

The Appellate Department of the Superior Court, in deciding a federal question of substance, has disregarded decisions of this court holding that states may enact statutes tending to aid and assist in the effectuation of the policy of Congress.

IV.

The federal question decided by the Appellate Department of the Superior Court is of the utmost importance to every state and to the federal government, as it involves the power of the states to enact laws within the reserved power of the states but which pertain to a field of regulation of commerce in which the Congress has entered, *i. e.*, the Mann Act; interstate transportation of stolen property and other stolen articles; narcotics, Pure Food and Drug Act, etc.

V.

Transportation of persons by unlicensed carriers in violation of positive penal laws of Congress is not interstate commerce within the intent or meaning of the commerce clause of the Constitution, or of laws enacted by Congress regulating interstate commerce so as to prevent the states

from prohibiting the sale of transportation to be carried by carriers thus unlawfully operating.

VI.

In order to protect the public against the evils growing out of the operation of so-called "travel bureaus" selling transportation over unlicensed and irresponsible carriers, it is necessary that the state aid and assist in the carrying out of the congressional policy. To accomplish this it is not only necessary that the aid of local authorities be utilized, but also that the offices of the state courts may be used in order that prompt trial, which at the present time is not available for the trial of minor misdemeanor cases in the United States District Courts, may be had.

If the decision of the Appellate Department of the Superior Court be correct with respect to this state statute, it is obvious that many other state statutes enacted to assist in carrying out federal policies, are likewise invalid. As a matter of constitutional law, the situation presented by a statute of a state so carefully drawn as to assist and not hinder the effectuation of congressional policy, and that presented by a statute of a state which either actually or potentially creates an irreconcilable conflict with such policy, is entirely different.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, commanding that court to certify

and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket: Superior Court No. CR A. 2386, Trial Court No. 61,797, "People of the State of California, plaintiff and respondent, v. Berl B. Zook and Wilmer K. Craig, defendants and appellants"; and that the said judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PEOPLE OF THE STATE OF CALIFORNIA,
By RAY L. CHESEBRO,
DONALD M. REDWINE,
PHILIP E. GREY,
JOHN L. BLAND,
Counsel for Petitioner.

APPENDIX.

To Petition for Writ of Certiorari and Brief in Support Thereof.

Chapter 1215 of Statutes of 1947 of the State of California, page 2723.

An act to repeal "An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof; and repealing an act entitled 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof,' approved June 5, 1931, and all acts or parts of acts inconsistent with the provisions of this act," approved May 15, 1933, and to add Sections 654.1, 654.2 and 654.3 to the Penal Code, relating to transportation of persons.

The people of the State of California do enact as follows:

Section 1. The act cited in the title hereof is repealed.

Sec. 2. Section 654.1 is added to the Penal Code, to read:

654.1. It shall be unlawful for any person, acting individually or as an officer or employee of a corporation, or as a member of a copartnership or as a commission agent or employee of another person, firm or corporation, to sell or offer for sale or, to negotiate, provide or arrange for, or to advertise or hold himself out as one who sells or offers for sale or negotiates, provides or arranges for transportation of a person or persons on an individual fare basis over the public highways of the State of Cali-

fornia unless such transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States, authorizing the holder of such certificate or permit to provide such transportation.

Sec. 3. Section 654.2 is added to the Penal Code to read:

654.2. The provisions of Section 654.1 of the Penal Code shall not apply to the selling, furnishing or providing of transportation of any person or persons

(1) When no compensation is paid or to be paid, either directly or indirectly, for such transportation;

(2) To the furnishing or providing of transportation to or from work, of employees engaged in farm work on any farm of the State of California;

(3) To the furnishing or providing of transportation to and from work of employees of any nonprofit cooperative association, organized pursuant to any law of the State of California;

(4) To the transportation of persons wholly or substantially within the limits of a single municipality or of contiguous municipalities;

(5) To transportation of persons over a route wholly or partly within a national park or state park where such transportation is sold in conjunction with or as part of a rail trip or trip over a regularly operated motor bus transportation system or line;

(6) To the transportation of passengers by a person who is driving his own vehicle and the transportation of persons other than himself and members of his family

when transporting such persons to or from their place of employment and when the owner of such vehicle is driving to or from his place of employment; provided that arrangements for any such transportation provided under the provisions of this subsection shall be made directly between the owner of such vehicle and the person who uses or intends to use such transportation.

Sec. 4. Section 654.3 is added to the Penal Code, to read:

654.3. Violation of Section 654.1 shall be a misdemeanor, and upon first conviction the punishment shall be a fine of not over two hundred fifty dollars ($250); or imprisonment in jail for not over 90 days, or both such fine and imprisonment. Upon second conviction the punishment shall be imprisonment in jail for not less than 30 days and not more than 180 days. Upon a third or subsequent conviction the punishment shall be confinement in jail for not less than 90 days and not more than one year, and a person suffering three or more convictions shall not be eligible to probation, the provisions of any law to the contrary notwithstanding.

FINDING OF THE INTERSTATE COMMERCE COMMISSION IN EX PARTE NO. MC 35.

Exemption of Casual, Occasional, or Reciprocal Transportation of Passengers by Motor Vehicles.

"We find that, in order to carry out the national transportation policy declared in the act, the exemption of the casual, occasional, or reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in section 203 (b) (9) of the act should be removed to the extent necessary and so as to make applicable all provisions of the act to such

transportation, when sold, offered for sale, provided, procured, furnished, or arranged for by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation or as a regular occupation or business." (*Ex parte* No. MC 35, 33 Motor Carrier Cases, 69, at page 81.)

JUDICIAL COUNCIL RULES—APPELLATE DEPARTMENTS, SUPERIOR COURT.

RULE 7. REHEARING AND FINALITY OF JUDGMENT.

(b) (*When judgment becomes final*) Unless a rehearing shall be so ordered, every judgment of an Appellate Department shall become final as follows:

(1) Upon the expiration of 7 days after the same shall have been pronounced, unless one or more petitions for a rehearing shall have been filed within said period of time;

(2) If one or more petitions for a rehearing shall have been filed within said time, then upon the expiration of 30 days after such judgment shall have been pronounced, if such rehearing shall not meanwhile have been granted, or upon the denial of all such petitions if all shall be sooner denied.

(3) Where the judgment is modified before it becomes final, as above provided, the period specified herein begins to run anew, as of the date of modification; but a change of the opinion without modification of the judgment does not postpone the time when the judgment becomes final.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner respectfully presents this brief in support of its petition for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to review the judgment of that court rendered in the case entitled, "People of the State of California, v. Berl B. Zook and Wilmer K. Craig," being case No. CR A 2386 in the records of such court.

Opinion of the Court Below.

Upon appeal by the defendants Berl B. Zook and Wilmer K. Craig from a judgment of conviction in the Municipal Court of the City of Los Angeles, the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, reversed the judgment of the trial court and, in an opinion, held the statute of the state, for violation of which defendants had

been convicted, to be invalid, and ordered that the complaint be dismissed [R. 24]. Such opinion will be printed in the permanent official California Appellate Reports, and will be cited as ..... Cal. App. 2d (Supp.) ..... By reason of the fact that it is not yet printed, we are unable to furnish at this time volume and page where it will appear. It will also be printed in Advance California Appellate Reports and in the Pacific Reporter, 2nd Series. Such opinion (unless reversed by this court) will be "the law of the case" in any court of Los Angeles County having jurisdiction of misdemeanors in which the validity of Section 654.1 of the California Penal Code is involved, and controlling authority in such courts where similar questions of constitutional law are involved. It will also be cited as controlling authority in all other courts of the State of California wherein are prosecuted misdemeanors involving questions of conflict with federal regulation of interstate commerce. Such opinion is printed in the record filed with this court [R. 19].

Under the practice in California, when a criminal misdemeanor case is remanded with instruction to dismiss the complaint, the only act to be performed in the lower court is the administrative act of entering, upon the order of such court, the formal order of dismissal. Entry of such order of dismissal constitutes a bar to the filing of a new complaint (California Penal Code, Sec. 1387). There remains no further judicial action to be taken in the Municipal Court and the judgment of the Appellate Department of the Superior Court is the final judgment in the case.

Grounds of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344 (b).) The date of the judgment of the Appellate Department of the Superior Court, sought to be reviewed, was July 21, 1948. Thereafter, within the time allowed by the Rules of the Judicial Council of the State of California governing appeals from the Municipal Court to the Appellate Department, petitioner filed its petition for rehearing [R. 25], which petition was duly considered and denied [R. 29].

Statement of the Case.

The defendants in the trial court and appellants in the Appellate Department, Berl B. Zook and Wilmer K. Craig, in a complaint filed in the Municipal Court of the City of Los Angeles, were jointly charged with violation of Section 654.1 of the California Penal Code [R. 2]. Such section, together with related sections, was added to the Penal Code by 1947 Statutes of California, Chapter 1215. Such statute is printed in full in an appendix to our petition for writ of certiorari [p. 27].

The defendants filed their demurrer to such complaint [R. 11] in which the federal question herein discussed was raised. Such demurrer is printed in full in the record [R. 3]. After hearing thereon the demurrer was overruled [R. 11] and the case came on for trial [R. 12]; at which time there was filed a written stipulation of facts [R. 12] which stipulation is printed in the record [R. 15] as part of the statement on appeal. Thereafter both defendants were convicted, after which each made a motion in arrest of judgment [R. 12]. Such motions were denied and judgment was entered against the defendants [R. 13],

from which judgment the defendants appealed to the Appellate Department, in all respects complying with the Rules of the Judicial Council of California governing such appeals.

The case came on for hearing in the Appellate Department of the Superior Court, and after briefs were filed by counsel for appellants and respondent and oral argument heard by the Appellate Court, the case was duly submitted and thereafter decided as hereinbefore stated.

A complete statement of the nature of the case has been made in our petition, hence, in the interests of brevity, we do not repeat it here, save to say that the case involves the power of the state to prohibit and make punishable acts wholly commenced and consummated in the State of California, which acts coincidentally affect interstate commerce, in that, in a matter of local concern and in aid of the policy of Congress, the state prohibits the sale, by persons engaged in such business, of transportation of persons where such persons are to be carried by carriers operating contrary to and in defiance of federal law, and who are subject to criminal prosecution under federal law.

As shown by the certificates of the judges of the Municipal Court [R. 30 and 31], the federal question was raised by defendants and opposed by the People at all times in such court.

The judgment of the Appellate Department is based solely upon its interpretation of certain decisions of this court, and no state question is involved.

Stated in its simplest form, the question is:

Is a state statute upon a matter of local concern only, which is calculated to and does tend to effectuate a policy of Congress, invalid because coincidentally the state, in legislating upon a matter within the reserved power of the state upon such matter of local concern, has included in such legislation matter concerning which Congress has legislated upon, when such state statute

(a) does not hinder or delay the movement of interstate commerce moving, either lawfully or unlawfully, under the federal law;

(b) affects only transactions which are entirely commenced and completed within the state;

(c) affects interstate transportation of persons only indirectly and incidentally, and affects only a phase of such transportation which is unlawful under federal law;

(d) does not present an actual or potential conflict with federal law or congressional policy; and

(e) does not touch interstate commerce except that it punishes for the commission of an act in California which act is also punishable under the federal law?

The only phase of interstate commerce touched by the statute is the carriage by casual, occasional or reciprocal carriers by motor vehicle of passengers to whom transportation is sold by persons engaged in the business of selling such transportation. The state does not undertake to regulate or prohibit the operation of such carriers, though their operation without a certificate of convenience and necessity or a contract carrier's permit, procured from

the Interstate Commerce Commission, is unlawful a punishable under the federal statute.

The state has confined its legislation to a prohibition the conduct of so-called "travel bureaus" which, by sellin to the public transportation over such casual carriers, n only aid and abet such carriers in their violation of th federal statute, but who, as an indirect incident of th order of the Interstate Commerce Commission (*Ex par No. MC 35*, 33 M. C. C. 69) making transportation b casual carriers of persons to whom transportation is sol by persons engaged in selling such transportation subjec to the provisions of the Federal Motor Carrier Act (Inter state Commerce Act, Part II, 49 U. S. C. A., Ch. 8), ar made subject to the provisions of such Act regulating th licensing and conduct of brokers.

The position of your petitioner is that a state statut which regulates a matter within the police power of th state; that affects a matter of local interest only; does no conflict with any federal law; does not stand as an obstac to the accomplishment and execution of the full purpose of Congress; does not constitute any burden whatsoeve upon lawful interstate commerce, and but incidentally o indirectly affects only such interstate commerce as is un lawful in its inception and conduct under the federa statute, does not have such coincidental relation to sul ject matter legislated upon by Congress as to make th state law invalid; and that the Appellate Department mi applied the statements of this court in various cases her inafter discussed where there was either actual or poten tial conflict between the two jurisdictions in the regul tion of commerce lawful under the federal statutes, b applying such cases to a state statute which affected, i directly only, interstate commerce which, under the feder

law, is unlawful in its inception and execution. Furthermore, that a course of conduct carried on in violation of federal laws regulating commerce is not "interstate commerce" within the intent or meaning of the decisions of this court concerning the power of the states to legislate upon matters of interstate commerce.

History of Legislation Involved.

In order to understand the various points discussed in our argument without unduly extending such argument, it is deemed advisable to briefly review the history of legislation and litigation concerning the operation of persons engaged in selling transportation over casual carriers.

In 1933 the legislature of the State of California enacted a statute commonly known as the Motor Carrier Transportation Agent Law (Stats. 1933, Ch. 390), by which the state provided for the licensing of persons who sold transportation of persons over the highways of the state for carriage by persons who were not carriers authorized by the State Railroad Commission or the Interstate Commerce Commission to engage in such business. In various cases in the state courts and in the Federal District Courts the validity of the law as it applies to intrastate transportation was upheld. In 1940 the Appellate Department of the Superior Court held such statute void, in so far as it applied to interstate commerce. Such decision was considered by this court in *California v. Thompson*, 313 U. S. 109, and reversed in 1941. Subsequently, in 1941, the legislature of the State of Cali-

fornia amended Section 2 of the state statute (Calif. Stats. 1941, Ch. 539).

So far as here pertinent, by such section it was provided that "In the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses" of motor carrier transportation agents acting as agents for motor carriers operating without licenses from either of the Commissions hereinbefore named, the law would apply to such agents selling interstate transportation by unlicensed carriers. About this same time the Interstate Commerce Commission conducted a hearing with respect to the practices of casual carriers and as a result thereof made an order which provided that, when casual carriers transported persons to whom transportation was sold by persons engaged in selling such transportation, such transportation was removed from the exception in the Federal Motor Carrier Act (Interstate Commerce Act, Sec. 203 (b) (9), 49 U. S. C. A. 303 (b) (9)), and was subject to all the provisions of the Interstate Commerce Act. The text of the order is set out in full in the appendix to our petition in this cause, at page 31.

Subsequent to these two changes, the validity of the California statute as it applied to interstate transportation, was raised in the Municipal Court, and upon appeal to the Appellate Department of the Superior Court (*People v. Edmondson*, Cr. A. 2160), such court sustained the order of the Municipal Court, holding the statute inapplicable to the sale of interstate transportation. Such court based

its decision in the *Edmonson* case upon two grounds: (1) that by reason of the provisions of the state statute, quoted above, upon the making of the order of the Interstate Commerce Commission in *Ex parte* No. MC 35 (33 M. C. C. 69), the state statute became, by virtue of its own limitation, inoperative upon interstate commerce (purely a state question) and (2) that because there was legislation by Congress upon the subject matter the state had no jurisdiction to enforce the state statute against persons selling interstate transportation (a federal question).

The People sought certiorari in such case, which was denied (*People of the State of California v. Edmondson*, 329 U. S. 716.)

Subsequently, the District Court of Appeal of the State of California passed upon the same California Statute and, as did the Appeliate Department of the Superior Court, held that the state statute did not apply to the sale of interstate transportation for two reasons, such reasons being the same as those enunciated by the Appellate Department (*People v. Van Horn*, 76 Cal. App. 2d 753).

The legislature was thus confronted with the fact that two state courts had held that by reason of the 1941 amendment to the Motor Carrier Transportation Agent Law, the law became ineffective upon the action by the Interstate Commerce Commission and by the fact that such courts had also held that any attempt on the part of the state to license such agents to perform acts prohibited by the federal law was beyond the power of the state, and

confronted with the further fact that the federal law notwithstanding, these travel bureaus were operating without interruption, to the loss and injury of members of the public. In order to protect the public, the legislature repealed the statute (Calif. Stats. 1933, Ch. 390) involved in such cases and enacted a statute the enforcement of which would not interfere with the movement of interstate commerce and would not only protect the traveling public of California but would aid in the effectuation of the policy of Congress and the Interstate Commerce Commission to prevent the operation of casual carriers unless and until they should secure permits of some sort authorizing them to engage in the business of transporting persons.

The statute thus enacted, added Sections 654.1, 654.2 and 654.3 to the California Penal Code, of which Section 654.1 is the statutory provision involved in this cause.

Specifications of Error.

The Appellate Department of the Superior Court erred in holding:

1. A statute of the State of California which prohibits the sale of transportation of persons on an individual fare basis, if such transportation is to be provided by persons who are not the holders of a permit of some nature from the Public Utilities Commission of California or the Interstate Commerce Commission authorizing such carrier to engage in such commerce, is invalid as it applies to persons selling interstate transporta-

tion of persons by unlicensed carriers operating in violation of the provisions of the Interstate Commerce Act (Federal Motor Carrier Act).

2. By holding that the rulings of this court in certain cases, based upon the facts before the court in such cases, applied to a case in which the facts and circumstances before the Appellate Department of the Superior Court were in no respect similar to the facts in the cases decided by this court and relied upon by the Appellate Department of the Superior Court as authority.

3. In disregarding and not following the oft-repeated holding of this court that state statutes, enacted under the police power of the state, will not be held to be invalid unless they create a situation which directly and substantially affected interstate commerce, hindered or interfered with the accomplishment of congressional policy or constituted an undue burden upon interstate commerce to such an extent that the state statute cannot be reconciled with federal statutes or federal control, and in holding that the mere fact that the federal government had entered upon a given field of legislation prevented the states from legislating upon such subject matter even though the relation between the state and federal legislation is coincidental.

4. By considering commerce of a class interdicted by Congress to be "interstate commerce" within the meaning of the various decisions of this court relative to the rights of states to legislate concerning interstate commerce.

Summary of the Argument.

I.

THE FEDERAL QUESTION IS SUBSTANTIAL.

II.

THE POLICY OF THIS COURT IS TO PERMIT JURISDICTION OF BOTH STATE AND FEDERAL GOVERNMENTS WHEN TO DO SO DOES NOT RESULT IN CONFLICT OF AUTHORITY.

III.

THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, IN ITS DECISION, HAS APPLIED DECISIONS OF THIS COURT IN A MANNER CONTRARY TO THE MEANING AND EFFECT THEREOF.

IV.

STATE STATUTES, ENACTED UNDER THE RESERVED POLICE POWER, AND APPLICABLE TO LOCAL CONDITIONS ONLY, WHICH DO NOT INTERFERE WITH THE FREE MOVEMENT OF INTERSTATE COMMERCE, ARE NOT VOID SOLELY BY REASON OF THE FACT THAT THEY INDIRECTLY AFFECT IN SOME SLIGHT DEGREE AN INCIDENTAL PHASE OF SUCH COMMERCE.

V.

A STATE MAY PUNISH FOR VIOLATION OF A STATUTE OF THE STATE EVEN THOUGH THE SAME ACT IS ALSO PUNISHABLE UNDER THE PROVISIONS OF A FEDERAL STATUTE.

VI.

COMMERCE CARRIED ON IN VIOLATION OF FEDERAL STATUTES IS NOT IN ITS TRUE SENSE A PROPER SUBJECT OF INTERSTATE COMMERCE, AND SUCH UNLAWFUL COMMERCE IS NOT WITHIN THE LIMITATION IMPOSED UPON THE STATES IN LEGISLATING UPON INTERSTATE COMMERCE.

VII.

CONCLUSION.

ARGUMENT.

I.

The Federal Question Is Substantial.

This court has had before it innumerable cases involving the relative powers of states and Congress to legislate upon the subject of interstate commerce. Such cases may be divided roughly into classes as follows:

1. Cases in which the state undertook to regulate a phase of interstate commerce which, from its nature, was subject only to federal control.

2. Cases in which the state statute imposed an undue burden upon interstate commerce even though no federal legislation was involved.

3. Cases which involved the validity of state laws which were in direct conflict with Acts of Congress.

4. Cases involving state statutes which, in the enforcement thereof, created actual interference with federal regulation or disclosed potential possibilities of conflict of authority.

5. Cases in which the state statute affected matters local in nature, and which only indirectly affected interstate commerce.

6. Cases in which the state statute involved covered a matter not legislated upon by Congress.

The present case presents a question which has never been before this court:

May the state, in legislating upon a matter of local concern and in aid of Congress and the Interstate Commerce Commission in carrying out the policy of entirely suppressing certain forms of interstate transportation by

motor vehicle, enact a law which punishes persons for commission of acts within the state, which acts incidentally touch a phase of interstate commerce by reason of the fact that persons subject to prosecution under the state statute are engaged in the business of selling transportation of persons for carriage by carriers engaged in interstate commerce, in violation of the penal provisions of the federal law?

The Interstate Commerce Commission has found it to be a fact that the operation of such carriers is detrimental to public interest (*Ex parte No. MC 35*, 33 M. C. C. 69), and by its order has made such carriers subject to all the provisions of the Federal Motor Carrier Act. By reason of such order a carrier who desires to transport persons to whom transportation is sold by a "travel bureau" may not lawfully operate until he secures a certificate of convenience and necessity or a contract carrier's permit from the Interstate Commerce Commission, and persons engaged in the business of selling such transportation are acting in violation of the provisions of the Interstate Commerce Act, Part II, Section 211, 49 U. S. C. A., Ch. 8, Sec. 311. Notwithstanding such order, the operation of such carriers continues apace, as does the operation of the "travel bureaus" engaged in selling such transportation. Because of the fact that operations of such bureaus are of a nature that as a practical matter no effective control measures can be adopted by Congress (*California v. Thompson*, 313 U. S. 109), it appears that unless the state, by legislation calculated to carry out the policy of Congress, may assist in stamping out the evil, it must continue unabated. One of the unfortunate features of such operations is that the persons who patronize such ticket agencies generally belong to that class of persons finan-

cially so conditioned that the loss or injury by reason of the acts of irresponsible operators of vehicles is serious though in actual dollars and cents it may not be substantial.

It is not only in this phase of interstate commerce that the question presented is substantial. The Congress, in an attempt to aid the states with respect to suppression of certain criminal activities having situs in two or more states, has enacted numerous laws having as their object assistance to the states in suppression of crimes directly affecting the citizens of the various states. One such law is the so-called federal Mann Act (federal White Slave Act). Although it is inconceivable that Congress intended to hinder the various states in their efforts to suppress prostitution, the Supreme Court of Montana, in *State v. Harper*, 48 Mont. 456 (138 Pac. 495), cited by the Appellate Department of the Superior Court in support of their decision in the instant case [R. 23], held that, by virtue of the enactment of the Mann Act, the state of Montana was precluded from enforcing a statute of that state declaring it to be unlawful to transport women from another state into Montana for the purpose of prostitution.

Subsequently, in *State v. Reed*, 53 Mont. 292 (163 Pac. 477), the court distinguished the *Harper* case, *supra*, by holding that, if the inducement and attempted transportation was complete within the state *before* interstate commerce (transportation) commenced, the state had jurisdiction to prosecute and punish. As thus distinguished by the Montana court, the *Harper* case fails to support the decision of the Appellate Department of the Superior Court in the instant case, and the case of *State v. Reed* tends to support our position.

State v. Harper, *supra* (48 Mont. 456, 138 Pac. 495) was also cited and distinguished in *In re Squires*, 114 Vt.

285, 44 Atl. 2d 13[illegible], in which the court held that, a prosecution may be had notwithstanding the federal White Slave Act under a state statute for soliciting or inducing a female to leave the state for an immoral purpose where solicitation is made or inducement offered without any step being taken toward the transportation of the female to another place.

In *Hewitt v. State*, 74 Tex. Cr. R. 46, 167 S. W. 40, it was held that a state statute penalizing the procuring or the attempt to procure a female to leave the state for the purpose of prostitution, was not in conflict with the federal White Slave Act since it did not seek to make criminal the transportation of a person from one state to another nor in any manner seek to control transportation.

Measured by the cases last cited, it appears that Section 654.1 of the California Penal Code constitutes a valid exercise of the police power of the state. However, if, as the Appellate Department of the Superior Court holds, the decision in the *Harper* case states the law with respect to such section, it follows that the same construction applies to Section 497 of the California Penal Code, which provides that persons who bring into this state property stolen in another state may be punished for theft in the same manner as if the theft had been committed in this state. If the decision of the Appellate Department in the instant case, and of the Supreme Court of Montana in the *Harper* case, be correct, it is readily manifest that Section 497 of the California Penal Code is unenforceable.

The importance of the question is accented by the fact that, in arriving at its conclusion in the instant case, the Appellate Department of the Superior Court depended, to some extent at least, upon the decision in the *Harper* case, which decision has been definitely limited by the state of

Montana in a subsequent decision, and, as applied in the instant case, is in conflict with the decisions of other jurisdictions involving substantially the same questions.

We could no doubt cite provisions of state laws with respect to narcotics which would suffer the same fate, also certain provisions of our Pure Food and Drug Acts, though in all probability, as to the Pure Food and Drug Acts, the case of *Armour v. North Dakota*, 240 U. S. 510, would probably be followed, but further illustrations are deemed unnecessary.

We deem it to be axiomatic that where, under its power of regulation, the federal government undertakes to permit under regulation the conduct of any feature of interstate commerce, the states by reason of actual or potential conflict between regulations concerning the conduct thereof, are precluded from enforcing their statutes even though no actual conflict of authority has in fact developed.

It appears equally clear that there is a distinct difference between "regulation" and "prohibition," and that when the Congress has determined that certain practices should be entirely prohibited, state laws enacted under the reserved police power, likewise punishing the commission of the same act, can be enforced. Whether this be true has never been decided by this court. Whether the state, in legislating upon matters of local concern may coincidentally aid in the effectuation of a policy of Congress to prohibit certain acts, is deprived of all power to make penal the same acts made penal by Congress solely because Congress has entered the field of legislation, is a most substantial federal question at this time when cooperation between the states and the federal government in the matter of suppression of crime is of the utmost importance.

II.

The Policy of This Court Is to Permit Jurisdiction of Both State and Federal Governments When to Do so Does Not Result in Conflict of Authority.

The decisions of this court have consistently supported exercise of the reserved police power by statutes which only incidentally or indirectly affected interstate commerce, except in cases in which exercise of authority by the state would result in conflict, actual or potential, with federal regulation or the regulation by the state would tend to prevent complete accomplishment of the policy of Congress. It can hardly be said that Congress in enacting the Federal Motor Carrier Act, intended to entirely close the field of incidental regulation to the states. In declaring and enacting such law they declared the National Transportation Policy (Act Sept. 18, 1940, Ch. 722, Title I, Sec. 1, 54 Stat. 899). Such policy includes cooperation "with the several States and the duly authorized officials thereof."

We find no case in which this court has held that Congress, by entering the field of regulation of interstate commerce by motor vehicles, intended to occupy the field to the exclusion of the states. In fact, the decisions of the court plainly indicate that such was not the intent of Congress.

So. Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177;

Mayer v. Hamilton, 309 U. S. 598, 614;

H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 85.

In *H. P. Welch Co. v. New Hampshire, supra,* this court quoted from *Illinois C. R. Co. v. State Pub. Utilities Comm.,* 245 U. S. 493, as follows:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested."

In *Kelly v. Washington,* 302 U. S. 1, the court, at page 10, said:

> "This principle is well established that the exercise of the police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'."

Numerous cases in support of this statement are therein cited.

The above principle of constitutional law is well illustrated in *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148, cited by the Appellate Department of the Superior Court in support of their judgment in the case at bar. In that case the court found that the regulations of the state were inconsistent, and, at page 156, stated the rule for determining whether a state statute was invalid:

> "When the prohibition of state action is not direct, but inferable from the scope and purpose of the federal regulation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulations."

There is not, nor can there be, any inconsistency between a state statute, which does not purport to regulate the conduct of those engaged in interstate commerce except to the extent that the state law prohibits the doing of acts the performance of which is prohibited by federal law, and a federal statute which prohibits the same acts which are made penal by the state statute. To adopt a statement from the brief of defendants upon their appeal to the Appellate Department of the Superior Court: "The point at issue, however is, of course, that the federal statute and the state statute punish exactly the same act."

In *Bob-Lo Excursion Co. v. Michigan* (decided Feb. 2, 1948), ... U. S. ..... (92 L. Ed. Adv. Opinions 339) this court upheld the validity of a statute of the state of Michigan requiring equal accommodations to all citizens patronizing public conveyances in so far as such statute was applied in a limited manner to foreign commerce. The court held that the regulation by the state, under the facts of the case, contained nothing out of harmony, much less inconsistent with the federal policy in the regulation of commerce between the United States and Canada. With respect to the argument that Canada might adopt regulations in conflict with the Michigan statute, the court said that, conceding the possibility of such action, the state was right in considering such action so remote as to be hardly more than conceivable.

Section 654.1 of the California Penal Code, here under consideration, like the Michigan statute, virtually affects only residents of the state. Unlike the Michigan statute, however, the California statute is so drawn that by its express provisions, when and if the Congress undertakes to regulate casual, occasional or reciprocal carriers by providing a method whereby they may be licensed, the statute

of the state becomes of no effect with respect to authorized agents of such licensed carriers. Like the Michigan statute, the California statute "contains nothing out of harmony, much less inconsistent" with the federal policy applicable to casual, occasional or reciprocal carriers, or persons who engage in the business of selling passenger transportation for travel by means of such carriers.

The language of Mr. Justice Douglas, in a concurring opinion concerning such Michigan statute, that "This regulation would not place a burden on interstate commerce within the meaning" of the decisions of this court, is apropos to the California statute under consideration. Mr. Justice Douglas further said: "The federal policy reflected in Acts of Congress indeed bars any such discrimination (* * *) and is wholly in harmony with Michigan's law." Such language is also apropos to the statute of California under consideration if we but recognize the fact that California, in its attempt to eradicate an evil predominately local in its effect, also prohibits only that which the Congress has prohibited.

In *Hartford Accident & I. Co. v. Illinois*, 298 U. S. 155, at page 158, this court held that, statutes of a state enacted under the police power, whose effect upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress, are valid until "Congress, under the commerce power, adopts *inconsistent* legislation." (Emphasis added.)

Respondents Zook and Craig never at any time urged nor did the Appellate Department of the Superior Court find that there was an inconsistency between the state and federal laws. The contention of the defendants was at all times that, because they were punishable under the federal law, Congress has so fully occupied the field of pos-

sible legislation that the same act could not be made punishable under a statute of the state.

We see no reason for unduly extending this brief by discussing or citing additional cases except to say, lest it be thought we are urging the rule of decision herein discussed to be a recent departure from a rule previously adhered to by this court, that at least since the decision in *Nashville, Ch. & St. L. R. Co. v. Alabama*, 128 U. S. 96, this court has consistently held that, though a statute of a state may affect interstate commerce but is not strictly a regulation of such commerce, being a part of that body of local law which governs the relation between the public and carriers, such statute is not displaced until it comes in conflict with an express enactment of Congress. The case last cited was cited and distinguished, but not disapproved as late as 1945, in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, in which the court found that a statute of Arizona was found to place an undue burden upon interstate commerce. The court in such case, at page 770, stated that there has been left to the states a wide scope for regulation of matters of local concern, though it in some measure affects interstate commerce, provided it does not materially restrict the free flow of commerce across the state lines.

Thus we see that, in deciding the instant case, the Appellate Department of the Superior Court has wholly disregarded the prevailing rule of decision of this court, and thereby decided a federal question of importance contrary to the applicable decisions of this court.

As we shall demonstrate in our following point, such result was attained by applying to the facts of this case decisions of this court upon factual situations in nowise similar to those in the case at bar.

III.

The Appellate Department of the Superior Court, in Its Decision, Has Applied Decisions of This Court in a Manner Contrary to the Meaning and Effect Thereof.

As stated in our petition, the decision of the Appellate Department of the Superior Court is based upon the proposition that, when Congress has entered the field of permitted legislation the state is barred from legislating in such field, or, as stated in *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 598, cited by the Appellate Department of the Superior Court in its decision: "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition . . ." The cardinal rule of interpretation of decisions of any court is, that language used therein must be read in the light shed by the facts of the case in which such decision was rendered. Although your petitioner well recognizes the rule that briefs should be concise, we know of no method whereby we can adequately show the intent of this court, in using language such as quoted above, to limit such language to cases in which there existed either a direct or potential conflict between the state and the federal government otherwise than by briefly pointing to the nature of the various cases cited by the Appellate Department of the Superior Court in which such language is used.

New York v. Compagnie Generals Transatlantique, 17 Otto (107 U. S.) 59, involved a statute of New York,

which levied a tax of one dollar upon each alien passenger brought into the state by vessel. The statute purported to be an "inspection" statute. This court, looking through the veil of obscurity caused by the title to the Act, found it to be a law designed to raise money to support paupers, etc.

Charleston & Western Carolina R. Co. v. Varnville Furniture Co., supra (237 U. S. 597), involved a statute of South Carolina which imposed a penalty of $50.00 upon any carrier which failed to either promptly pay a claim for damages or show that the damages were occasioned by another carrier. The federal law declared the initial carrier responsible for damage occurring to shipments. It is to be noted that, in holding the South Carolina statute void, the court cited and distinguished *Missouri K. & T. R. Co. v. Harris,* 234 U. S. 412, 420, in which the court upheld the imposition of a reasonable attorney's fee if claim was sued upon and recovered in full. The court did not even intimate that the decision in the *Harris* case was incorrect. Had the language in *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.,* quoted by the Appellate Department, been intended to cover all cases in which there was coincidence only upon the matter of regulation, it is inconceivable that Mr. Justice Holmes would have cited the *Missouri K. & T.* case with evident approval.

Missouri Pac. R. Co. v. Porter, 273 U. S. 341, involved a statute of Arkansas which established liabilities upon shippers which were in direct conflict with the limitation

of liabilities established under federal law. This is a case of direct conflict.

Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, involved the power of the state of Washington to prohibit, by embargo, the shipment of alfalfa hay into that state from other states. The court found that Congress had taken over the matter of quarantine of plants, etc. It follows that matter not quarantined by order of the United States Department of Agriculture may be lawfully moved in interstate commerce. Here again we have a direct conflict between state and federal authority. In contrast, the California statute (Penal Code Sec. 654.1), involved in the instant case, presents no conflict or possibility of conflict with federal law or policy. Its primary force is upon a matter of local concern and its effect upon interstate commerce is indirect only and such effect continues only until such time as Congress provides some method whereby casual, occasional or reciprocal carriers, carrying passengers to whom transportation is sold by persons engaged in the business of selling such transportation, may lawfully operate in such manner.

In *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, the question was whether, after Congress had enacted a law governing the hours of labor of railroad employees, which law was not to go in effect for one year, the state could regulate such hours of labor in the interim. Suffice it to say that, whatever may be the proper rule in this respect applicable to railroads, this court in *Welch Co. v. New Hampshire*, 306 U. S. 79, at page 85, held that, even

though the Federal Motor Carrier Act became effective, state laws governing hours of labor of truck drivers applied to interstate carriers until such time as the Interstate Commerce Commission had prescribed applicable regulations. The court stated in the *Welch* case that the purpose of Congress to displace local law must be definitely expressed, and that in construing federal statutes it should never be held that Congress intends to supersede or suspend the exercise of reserved (police) power of the states unless, and except, in so far as purpose so to do is clearly manifest.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, presented a direct conflict between the state and the federal government, in that the federal government had undertaken to determine what reprocessed butter could be shipped in interstate commerce and the state had undertaken to condemn and confiscate substances approved by the United States Agriculture Department. In contrast, in the case at bar the federal and state authorities have condemned exactly the same act and each has prescribed punishment for doing such act.

Bethlehem Steel Co. v. New York Labor Relations Board, 330 U. S. 767, involved the power of the state of New York to recognize foremen as a class for the purpose of determining bargaining rights. To analyze the decision in that case would unduly extend this brief. Suffice it to say that the court found that the National Labor Relations Board had at no time declined jurisdiction over foremen, but had held that unions of foremen were not proper

bargaining units, and held, in effect that Congress had delegated all power in respect to such matters to the National Labor Relations Board, and the determination of such Board that foremen's unions were not proper bargaining units precluded the state from recognizing such unions as bargaining units with respect to firms engaged in interstate commerce.

In *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, it appears that under federal law the Interstate Commerce Commission was authorized to prescribe safety equipment for railroad cars to be used in interstate commerce, and the state Railroad Commission was empowered to prescribe safety regulations for such cars moving within the state. The fact of potential conflict becomes obvious, in that, if the state Commission had authority to prescribe rules governing all cars moving within the state, it had power to require equipment different from that prescribed by the Interstate Commerce Commission, and the ensuing result might be the necessity of unloading and transferring freight at the state lines. The difference between such case and the case here presented, is that in the instant case the movement of interstate commerce, even though unlawful under the federal law, is not interfered with in the slightest degree by the California statute.

IV.

State Statutes, Enacted Under the Reserved Police Power, and Applicable to Local Conditions Only, Which Do Not Interfere With the Free Movement of Interstate Commerce, Are Not Void Solely by Reason of the Fact That They Indirectly Affect in Some Slight Degree an Incidental Phase of Such Commerce.

At the risk of appearing repetitious, we again point out that Section 654.1 of the California Penal Code affects interstate commerce only in an indirect manner, in that it only prohibits the sale by persons engaged in the business of transportation of passengers to be carried by persons operating in violation of federal law. It does not interfere with the movement of the person to whom transportation is sold, nor does it hinder the operation of the carrier, unlawful though his conduct may be. The act of the dealer in transportation is wholly completed within the state before transportation commences. There are transactions affecting to some slight degree interstate commerce, which, from their nature, cannot be adequately reached by any Act of Congress (*California v. Thompson*, 313 U. S. 109, 113), and the kind of transactions reached by Section 654.1 of the California Penal Code belong to such class. (See, *California v. Thompson, supra.*)

Statutes which are not directed at interstate commerce but only incidentally interfere with such commerce are not necessarily void.

Lake Shore & M. C. R. Co. v. Ohio, 173 U. S. 285, 303.

State regulation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may to some extent or under some circumstances affect such commerce.

Lake Shore & M. C. R. Co. v. Ohio, supra, p. 304.

The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concern, even though such legislation may indirectly and incidentally affect interstate commerce.

Boston & M. R. Co. v. Armburg, 285 U. S. 234, 238.

The interference with the commerce power of the federal government, to be unlawful, must be direct and not the merely incidental effect of enforcing the police power of the state.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518-519.

In conferring upon Congress the regulation of commerce it was never intended to cut the states off from legislating upon all subjects relating to the health, life and safety of its citizens, though such legislation might indirectly affect interstate commerce.

Crossman v. Lurman, 192 U. S. 189, 197.

To apply the language of the court in *Austin v. Tennessee*, 179 U. S. 343, at page 350, to the instant case, we say that though the state of California may be prohibited from entirely interdicting interstate commerce by casual, occasional or reciprocal carriers, it is not bound to furnish a market for persons engaged in selling transportation for carriage by such carriers, operating in violation of federal statutes.

In the instant case we find the Messrs. Zook and Craig in effect saying that because the Congress has said that their acts are punishable under federal statutes, the State of California is required to furnish them with an opportunity to engage in such unlawful practice until such time as federal authority compels them to withdraw therefrom.

In *Panhandle E. Pipe Line Co. v. Public Service Com.* (decided December 15, 1947), ... U. S. ....., the court, in speaking of the federal statute involved in such case, said:

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption."

It may be urged by the respondents to this brief that the Congress definitely indicated an intent to permit limited regulation by the states. To such argument we reply that, by its statement in the declaration of the National Policy (54 Stats. 877, Ch 722, Title I, Sec. 1), which declared cooperation with the various states and the officials thereof to be an element of such policy, Congress indicated an intent that state statutes, which only incidentally affected interstate commerce and tended to effectuate the common policy of the federal and state governments, should not be declared invalid merely because such state enactments related to a field of regulation into which Congress had entered.

V.

A State May Punish for Violation of a Statute of the State Even Though the Same Act Is Also Punishable Under the Provisions of a Federal Statute.

In argument in the Appellate Department of the Superior Court, in support of the point stated above, we cited certain cases which are cited by such court in its opinion. It would appear from the decision of such court that they thought there was something peculiarly sacrosant concerning regulation of interstate commerce which prevented the application of such principle of law to commerce cases.

As we view the federal Constitution, the power granted to Congress by the commerce provision differs none whatever from other powers granted the Congress, save and except a difference in subject matter. In short, whenever any power is granted to Congress such grant prevents state legislation in conflict with statutes enacted by Congress pursuant to the power granted. We concede that, if a state statute be void by reason of being in conflict with the Acts of Congress, constituting an undue burden upon interstate commerce or standing as a hindrance to the carrying out of the policy of Congress, the power of the state to punish falls with the remainder of the state statute. On the other hand, if the statute of the state is within the power of the state to enact, the fact that it punishes an act punishable under a federal law does not render the statute void. This court has consistently held, at least since *Fox v. Ohio*, 5 Howard 410, that even though an act be punishable by the federal government such fact does not prevent punishment for the same act under the provisions of a state statute enacted for the protection of the citizens of the state.

In *U. S. v. Marigold*, 9 Howard 560, the court, at page 569, approved the conclusions in *Fox v. Ohio, supra.*

In *In re Siebold* (Habeas Corpus cases), 100 U. S. (10 Otto) 371, in supporting the power of both state and federal governments to enact statutes upon the same subject matter, the court said:

> "There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same Legislature."

Thereafter, in its opinion, with respect to the contention that an officer might be made liable to two penalties, the court said that where a person owes a duty to two sovereigns either may hold him to account.

The same rule was followed in *Cross v. North Carolina*, 132 U. S. 131.

The Appellate Department of the Superior Court, in its decisions, points to that in *Southern R. Co. v. Railroad Com.*, 236 U. S. 439, the *Cross* case was held to be inapplicable. However, it must be noted that in the *Southern R. Co.* case the court explained in detail the reason why the rule in the *Cross* case was not applicable in that particular case. Again, in *U. S. v. Lanza*, 250 U. S. 377, this court delineated the application of the principal of responsibility to the laws of two jurisdictions. Inclusion herein of quotations from such cases, explaining under what circumstances the principle of law under consideration did and did not apply, would unduly extend this brief.

Briefly, the rule of application is that, if the state statute which prescribes punishment is wholly void because of conflict, actual or potential, with a federal law

upon the same subject matter, the power to punish falls with the statute.

In no case has this court held that, the fact that because a state statute provides punishment for an act punishable under federal law, the state enactment is void. In other words, in every case in which the question arose, this court has supported the right of the state to punish under any state statute within the field of permissive state legislation.

VI.

Commerce Carried on in Violation of Federal Statutes Is Not in Its True Sense a Proper Subject of Interstate Commerce, and Such Unlawful Commerce Is Not Within the Limitation Imposed Upon the States in Legislating Upon Interstate Commerce.

In *Kelly v. Washington*, 302 U. S. 1, at page 15, the court said that a vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense, is not within the protection of federal laws and that the state may treat it as it may treat a diseased animal or unwholesome food.

In *Ziffrin v. Reeves*, 308 U. S. 132, the court, at page 139, said that property which, under a state statute, is subject to forfeiture, cannot be regarded as a proper article of commerce. By the same token, the transportation involved in the case at bar cannot be regarded as a proper article of commerce.

The Interstate Commerce Commission, by its order in *Ex parte No. MC 35*, 33 M. C. C. 69, declared casual, occasional or reciprocal carriers, who transport passengers to whom tickets are sold by persons engaged in the business of selling transportation, subject to all the provisions

of Part II of the Interstate Commerce Act. Thereby, the operation of such carriers without first securing authority from the Interstate Commerce Commission so to do, was prohibited under the federal law. Those who persist in operating in violation of such law, though they are entitled to all the protection afforded by the Constitution if charged with the violation of such law, are not in position to urge that because they are engaged in the physical act of transporting persons between points in separate states they are engaged in "interstate" commerce within the spirit or meaning of the federal Constitution or of federal statutes.

By the same token it follows that, persons who engage in the business of selling transportation for carriage by such carriers in violation of the provisions of the Interstate Commerce Act, Part II, Section 211 (49 U. S. C. A., Ch. 8, Sec. 311), are not engaged in such commerce within the limitations imposed upon the state, and, unless protected by some provision of the federal Constitution other than the commerce clause, their conduct is subject to the police power of the state.

It is certainly an anomalous situation to find persons, as we find them in the case at bar, standing before the court and urging that, because of the fact that they are in effect aiding carriers in their violation of federal law, and thereby themselves become subject to prosecution for violation of such law, they are thereby rendered immune from prosecution under a state statute which provides punishment when and if they sell such contraband transportation.

VII.

Conclusion.

It is submitted by your petitioner that the statute of the State of California, involved in the instant case, is well outside the limitations imposed upon the states with respect to legislating upon interstate commerce, however broad such limitations may be.

The matter is of utmost importance to the people of the State of California for the reason that, in California, probably more than in any other state, numerous persons find that for various reasons they are required to go east and are disposed to avail themselves of the opportunity to travel by so-called casual carriers. Altogether too frequently such persons are "dumped" before the carrier, by crossing the state line, thereby engages in interstate commerce.

If it is impossible for the state to eliminate the "travel bureau" which too often has no interest in anything but the remuneration coming to him from the sale of the transportation, and exercises no care in determining the responsibility of the carrier whose services are to be utilized, the loss and injury will continue unabated.

It is to be noted that the statute does not prevent casual carriers from transporting persons when the arrangement for such transportation is carried on solely by and between the carrier and the prospective passenger. Assuming that such carriers fill a public need of transportation of persons who cannot afford to pay the fare demanded by licensed carriers, such field is left open to the public so long as

they personally arrange for such transportation and therefore personally estimate the probability of improper action upon the part of the carrier.

The petition in this case should be granted.

Respectfully submitted,

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